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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE, *Respondent.*

On Writ of Certiorari to the Supreme Court
of the State of California

BRIEF OF NATIVE AMERICAN LAW STUDENTS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS, THE NATIVE AMERICAN STUDENT UNION OF THE UNIVERSITY OF CALIFORNIA AT DAVIS, THE AMERICAN INDIAN BAR ASSOCIATION, THE AMERICAN INDIAN LAW STUDENTS ASSOCIATION AND THE AMERICAN INDIAN LAW CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS.

DENNIS HOPTOWIT
CALIFORNIA INDIAN
LEGAL SERVICES
1736 Franklin Street
Suite 900
Oakland, California 94612

A. JOHN WABAUNSEE
WALTER R. ECHO-HAWK
THOMAS W. FREDERICKS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302

Counsel for Amici Curiae

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This brief *amici curiae* is submitted with the consent of counsel on behalf of the Native American Student Union at the University of California at Davis, Native American Law Students at the University of California at Davis, the American Indian Bar Association, the American Indian Law Students Association, and the American Indian Law Center, in support of the

petitioners, the Regents of the University of California.

INTEREST OF AMICI

The Native American Student Union at the University of California, Davis, is an organization of Native American students attending the University of California at Davis. At the present time there are 60 members of the Native American Student Union, many of whom plan to attend graduate or professional schools within the University of California system. Members of the Native American Student Union hope to utilize special admissions programs such as the one used by the University of California at Davis Medical School.

The Native American Law Students at the University of California at Davis School of Law is an organization whose membership consists solely of Native American law students at the University of California at Davis. One of the goals of the Native American Law Students is to increase the number of Native American law students at the University of California at Davis School of Law through the use of special admissions programs similar to the ones used by the University of California at Davis Medical School. If the special admissions program for the University of California at Davis Medical School is held to be unconstitutional, the Native American Law Students fear the number of Native Americans and other minority students at the School of Law will diminish.

The American Indian Bar Association, Inc., and the American Indian Law Students Association, Inc. are non-profit organizations whose regular membership consists solely of American Indian lawyers and law

students. Both organizations have an interest in the outcome of this case, because the elimination of special admissions programs could drastically reduce the number of Indians who would be admitted into law schools and the practice of law.

The American Indian Law Center is a non-profit organization with offices at the University of New Mexico Law School. One of the major programs of the American Indian Law Center is the administration of a special scholarship program funded by the Bureau of Indian Affairs to assist American Indian law students by means of a special summer program and financial assistance during law school. At the present time, the American Indian Law Center provides scholarship assistance to 132 American Indian law students.

All of these organizations support special admissions programs for minority students because of the benefits that American Indians and Indian tribes will receive as a result of increased numbers of Indian college graduates. A determination that special admissions programs are inconsistent with the Equal Protection Clause of the Fourteenth Amendment could drastically limit the number of American Indian and other minority students in higher education programs, especially those such as law and medicine.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as presented in the Petition for Writ of Certiorari to the Supreme Court of the State of California.

SUMMARY OF ARGUMENT

1. The University of California's use of racially based admissions criteria is not inconsistent with the Equal Protection Clause of the Fourteenth Amendment when the intent is to increase the number of minorities in professional schools which have few numbers of minority students.

2. If this Court should affirm the decision of the California Supreme Court, the Court in its Opinion should specifically indicate that the Court is not ruling on whether special admissions programs for Indians are constitutional.

ARGUMENT

I

The University of California's Special Admissions Program Is Consistent with the Equal Protection Clause of the Fourteenth Amendment

Amici do not intend to offer additional arguments as to the constitutionality of the special admissions program of the University of California at Davis Medical School. Counsel for the Board of Regents of the University of California and other *amici* have adequately addressed the questions, and *amici* join in their arguments that the University of California plan is constitutional.

Amici only wish to point out that historically there have been few American Indians in medical, legal and other professions.[1] However, American Indians have

[1] *See* H.Rept. No. 94-1026—Part I, 94th Congress, 2d Session at p. 17 for a discussion of the lack of Indian physicians. *See also* Christopher and Hart "American Indian Law Scholarship Program at the University of New Mexico", 1970 Toledo L. Rev. 691, for a discussion of the lack of Indian attorneys.

been able to utilize special admission policies to gain admission to undergraduate, graduate and professional schools. Congress has recognized the lack of Indian professionals in areas such as law, health and education by authorizing special grants and scholarships to American Indians who wish to enter these fields. *See, e.g.*, Title I of the Indian Health Care Improvement Act, 90 Stat. 1400, 25 U.S.C. §§ 1611-1615 and Title VI of the Education Amendments of 1974, 88 Stat. 484, 20 U.S.C. § 887c-1. In order to effectuate the congressional policy of encouraging Indians to enter various undergraduate, graduate and professional schools, the admissions criteria of schools must take into consideration the applicant's racial, cultural and ethnic background.

II

State Specal Admission Programs for Indians In Furtherance of Congressional Policy Is Consistent with the Equal Protection Clause

Amici point out here that the legal status of American Indians as members of Indian tribes with respect to special admissions is vastly different than the status of non-Indian persons. This unique legal status stems from Indian tribes' unique relationship with the United States. This Court on numerous occasions has held that special treatment by Congress for Indians based on their status as members of Indian tribes is not inconsistent with the Due Process Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment and Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, *et seq.*; *United States* v. *Antelope*, 45 U.S.L.W. 4361 (April 19, 1977); *Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Fisher* v. *District Court*, 424 U.S. 382

(1976); and *Morton* v. *Mancari*, 417 U.S. 535 (1974). In upholding a congressional scheme of giving preference to American Indians in employment in the Bureau of Indian Affairs, this Court said:

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives are governed by the BIA in a unique fashion. . . . Here the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Morton v. *Mancari*, 417 U.S. at 554. *Amici* submit that if a state provides special treatment to Indians as members of Indian tribes, in furtherance of congressional policy, the special treatment does not violate the rights of non-Indians.[2] Moreover, the failure of the State to provide a special admissions program for Indians as members of Indian tribes would frustrate express congressional policies and programs which seek to increase the number of Indian professionals.

This Court has not addressed the question of whether preferential treatment for American Indians by a state in furtherance of congressional policy is a valid classification. *Amici* fear that if the University of California system for special admissions is held invalid, by implication, special programs for Indians in furtherance of congressional policy may be held similarly invalid. *Amici* respectfully request that if the University of California special admissions policy is

[2] On numerous occasions the State of California has singled out Indians for special treatment. *See, e.g.*, Cal. Fish and Game Code § 2154, and Cal. Ed. Code § 521, *et seq.*

declared invalid, that this Court specifically decline to rule on whether special admissions policies for American Indians as members of Indian tribes are invalid.

CONCLUSION

Amici urge this Court to reverse the decision of the Supreme Court of California and hold that special admissions policies based on race are consistent with the Equal Protection Clause of the Fourteenth Amendment. In the alternative, *amici* suggest that if the decision of the Supreme Court of California is affirmed, that the Opinion be written in such a fashion so as not to prejudice constitutional special admissions programs for Indians. It is beyond dispute that the vitality, culture, and well-being of Indian tribes depend to a substantial degree upon tribal members' access to institutions of higher education. As such, American Indians have a large stake in special admissions policies.

Respectfully submitted,

A. John Wabaunsee
Walter R. Echo-Hawk
Thomas W. Fredericks
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Dennis Hoptowit
California Indian Legal Services
1736 Franklin Street
Suite 900
Oakland, California 94612

Counsel for Amici Curiae

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